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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 42993
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR 2014-2994
v.)	
)	
MARVIN GORDON CROTTO,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE STEVEN J. HIPPLER
District Judge

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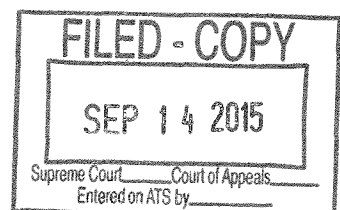


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STATEMENT OF THE CASE

Nature of the Case

Two police officers went to the home of Marvin Gordon Crotto to investigate an anonymous tip. Mr. Crotto consented to the officers' initial entry into his home, but he contends that his subsequent consent to search the safe in his bedroom was involuntary. As a result of the search of the safe, the officers found a small baggie with less than one gram of methamphetamine and drug paraphernalia. The State charged with Mr. Crotto with three drug-related offenses, and Mr. Crotto moved to suppress the evidence obtained from the search of the safe. The district court¹ denied his motion. He now appeals to this Court.

Statement of the Facts and Course of Proceedings

On April 28, 2014, the State filed an Information against Mr. Crotto, charging him with possession of a controlled substance, methamphetamine, a felony, in violation of Idaho Code § 37-2732(c); possession of a controlled substance, marijuana, with the intent to deliver, a felony, in violation of Idaho Code § 37-2732(a); and possession of drug paraphernalia, a misdemeanor, in violation of Idaho Code § 37-2734A. (R., pp.33–34.)

These charges arose out of a warrantless search of Mr. Crotto's home in which law enforcement found marijuana, less than one gram of methamphetamine, and drug

¹ The Honorable Mike Wetherell conducted the hearing on Mr. Crotto's motion to suppress and ruled on the motion. Upon Judge Wetherell's retirement, the Honorable Steven J. Hippler took over the case and held the sentencing hearing.

paraphernalia. (Presentence Investigation Report (“PSI”),² pp.16, 25.) On July 31, 2014, Mr. Crotto filed a motion to suppress the methamphetamine and certain drug paraphernalia. (R., pp.43–44.) On September 11, 2014, the State objected to the motion. (R., pp.52–56.)

On October 10, 2014, the district court held a hearing on Mr. Crotto’s motion. (R., p.63.) The officers who conducted the search testified, and an audio recording of the search was admitted into evidence as the State’s Exhibit 1. (R., p.63.) The officers’ testimony and the audio recording³ provide the following account of the search.

On January 8, 2014, at approximately 4:00 p.m., Boise Police Department Officers Keely and Reimers went to Mr. Crotto’s home, a single-wide trailer, for a “knock and talk.” (R., pp.64–65; Tr. Vol. I,⁴ p.11, Ls.12–13, p.25, L.25–p.26, L.4) Officer Keely was “following up on a tip” as the neighborhood contact officer. (Tr., Vol. I, p.9, Ls.4–8.) As stated by Officer Keely, “[t]he tip was a concern that there was drug sales [sic] or activity occurring at that residence.” (Tr. Vol. I, p.9, Ls.14–16.) The tip also reported “frequent foot traffic and vehicle traffic in and out of the trailer that stayed for a short time,” which was “historically a complaint.” (Tr. Vol. I, p.9, Ls.16–20.)

Once the officers arrived at Mr. Crotto’s home, Officer Keely knocked on the door, and Mr. Crotto answered. (Tr. Vol. I, p.9, L.24–p.10, L.20.) The officers were in

² Citations to the PSI refer to the 105-page electronic document titled “Crotto 42993 psi.”

³ Mr. Crotto respectfully requests that the Court listen to the audio recording as it captures the tone of the interaction between Mr. Crotto and the officers.

⁴ There are two transcripts in the record on appeal. The first transcript, Volume I, contains the suppression hearing, dated October 10, 2014, and the entry of plea hearing, dated November 20, 2014. (The entry of plea hearing is mistakenly referred as the sentencing hearing in this transcript’s Index of Proceedings.) The second transcript, Volume II, contains the sentencing hearing, dated February 3, 2015.

uniform. (Tr. Vol. I, p.10, L.23, p.13, Ls.2–10, p.28, L.23–p.29, L.24, p.54, Ls.6–11.) Officer Keely introduced himself and Officer Reimers to Mr. Crotto. (Tr. Vol. I, p.10, Ls.23–24; State's Ex. 1, Audio CD ("Audio") 2:03–16.) Officer Keely then asked, "Can we come in and chat with you for a moment? Is that ok?" (Audio 2:16–18.) Mr. Crotto responded, "I guess," and he stepped aside for the officers to enter his home. (Audio 2:18–20; Tr. Vol. I, p.11, Ls.1–5.)

Inside Mr. Crotto's home in the living room/kitchen area, Officer Keely informed Mr. Crotto that he was following up on an anonymous tip "complaining about the traffic coming in and out of your house." (Audio 3:13–31.) Mr. Crotto immediately responded, "Well, I have, you know, caretakers that come every single day. I got [sic] a PSR worker that comes twice a week. And a therapist [inaudible]." (Audio 3:31–40.) Officer Keely said, "Ok, so and the concern -- in the complaint is that maybe you were selling drugs here and that's why they called it in." (Audio 3:40–47.) Mr. Crotto responded, "No, I got [sic] so much going on with my caretakers, and PSR workers, and therapists, and all that kinda stuff." (Audio 3:47–55.)

Officer Keely then questioned Mr. Crotto about the individuals that would come over to his house. (Audio 3:55–4:03.) Mr. Crotto explained that he had only a few friends that would come over and "other than that, it's all state workers and stuff. PSR worker. Health care. And all that stuff." (Audio 4:03–16.) At this point, Officer Keely asked, "What disabilities . . . do you mind if I ask, what disabilities do you have?" (Audio 4:17–19) Mr. Crotto answered, "Uh, kind of mental." (Audio 4:19–22.) Officer Keely responded, "Ok, gotcha." (Audio 4:22–23.)

Officer Keely continued to question Mr. Crotto. The officers learned that Mr. Crotto's son lived with him, but his son was not home. (Tr. Vol. I, p.14, Ls.14–21; Audio 4:25–30.) Mr. Crotto's friend, however, was in the home and present for most of the investigation. (Tr. Vol. I, p.11, L.14–p.12, L.5, p.57, Ls.6–8.)

The officers noted a “Wake Me Up at 420” sign on the wall, and Mr. Crotto acknowledged that he used to smoke marijuana. (Audio 4:47–53; Tr. Vol. I, p.12, Ls.8–12.) Officer Keely followed up, “And do you smoke weed anymore occasionally? No one’s going to jail over something like that today.” (Audio 4:53–58.) Officer Keely questioned Mr. Crotto about his marijuana use and possession, asking if he had a “grow” or was “supplying dope.” (Audio 4:58–5:20.) Mr. Crotto responded, “No,” but he admitted to smoking marijuana occasionally. (Audio 4:58–5:10, 5:20–22.) Due to Mr. Crotto's responses, Officer Keely explained: “That’s why I like to come talk to people face to face . . . You don’t have that kind of history I see obviously. To that extent that stuff you did have was old stuff.” (Audio 5:20–5:35.) Mr. Crotto quickly responded, “No, just PSR workers. And I got [sic] a lot of stuff going on.” (Audio 5:35–39.) Officer Keely stated, “Yeah . . . That seems reasonable. That could be the deal.” (Audio 5:39–42.) Mr. Crotto elaborated, “Cuz they’re here -- My caretaker’s here every day. And my PSR workers twice a week. And therapist once a week.” (Audio 5:42–52.) Officer Keely responded, “K, gotcha.” (Audio 4:52–54.)

Officer Keely again informed Mr. Crotto that “no one would go to jail today” even if he had “a little something.” (Audio 5:54–6:08.) He asked if Mr. Crotto would walk through his home with Officer Reimers “to make sure” that he did not have a “big grow” or “drugs all over the house.” (Audio 6:08–16.) Mr. Crotto stated, “I’d prefer not.” (Audio

6:17–19.) Officer Keely asked, “Ok, is there a reason why?” (Audio 6:19–21.) Mr. Crotto answered, “Just it’s private. It’s my house.” (Audio 6:21–23.) Officer Keely again asked why, telling Mr. Crotto “nothing changes” if it was just “a small pipe or something.” (Audio 6:23–27.) Mr. Crotto explained, “I don’t really want you [inaudible] through the house.” (Audio 6:30–33.) Officer Keely then responded, “Ok, is it because you’re worried about – you think I’m going to arrest you for a small pipe? I’m not gonna [sic]. You just have one pipe?” (Audio 6:34–41.) Mr. Crotto responded, “I’d prefer not.” (Audio 6:41–43.)

Officer Keely continued to question Mr. Crotto about the pipe and marijuana use, asking, “What is it that you’re worried about?” (Audio 6:45–47.) He reassured Mr. Crotto that this was “no big deal,” but “I need to resolve the complaint.” (Audio 6:58–7:00.) Officer Keely stated if it was just “a little bit of weed and a pipe, ‘cuz that isn’t gonna [sic] send you to jail today, like I promised.” (Audio 6:45–7:11.) Officer Keely asked, “Would you mind collecting that? Is that ok? We could just deal with it that way.” (Audio 7:11–15.) Mr. Crotto answered, “I’ll go get it. I’ll give it to you.” (Audio 7:17–21.)

Officer Reimers then attempted to go with Mr. Crotto into his bedroom to retrieve the item. (Audio 7:21–24.) Mr. Crotto hesitated, and Officers Keely and Reimers explained that Officer Reimers would accompany Mr. Crotto for safety reasons. (Audio 7:24–8:15.) Mr. Crotto asked if they could leave the house and he would bring the item to the door. (Audio 8:02–8:08.) Mr. Crotto then stated, “I just don’t want you -- into my house. It’s quite simple. You guys are making me nervous.” (Audio 8:15–21.) Officer Keely responded, “We’re trying to work with you. Honestly.” (Audio 8:21–23.) Mr. Crotto then said, “Get a hold of my PSR worker, my caretaker worker or something then.”

(Audio 8:23–26.) Officer Keely stated, “I don’t know your PSR worker.” (Audio 8:26–28.) Mr. Crotto offered his PSR worker’s phone number. (Audio 8:28–30.) Officer Keely said in response, “Ok, I don’t care about your PSR worker. Here’s the deal, Marvin. There’s something here. We already know that. We established it.” (Audio 8:30–35.) After more questioning by the officers, Mr. Crotto stated, “I just don’t want you in my room. It’s my room. I got [sic] all my stuff laying out. Personal stuff.” (Audio 8:48–54.) After even more questioning and discussion, Mr. Crotto allowed Officer Reimers to accompany him. (Tr. Vol. I, p.18, Ls.4–6, p.57, Ls.11–13.) Officer Reimers followed Mr. Crotto to his bedroom and stood at the doorway while Mr. Crotto retrieved a small pipe. (Tr. Vol. I, p.18, Ls.15–21, p.57, L.22–p.58, L.5; Audio 10:50–55.)

While Officers Reimers accompanied Mr. Crotto to his bedroom, Officer Keely questioned Mr. Crotto’s friend. (Audio 9:24–10:50.) Officer Reimers and Mr. Crotto came back with a marijuana pipe, and Officer Reimers reported that Mr. Crotto still did not want them in his bedroom. (Audio 10:50–57.)

The officers continued to ask Mr. Crotto for additional items, telling him “no one’s going to jail today.” (Audio 10:50–11:24.) Mr. Crotto stated, “I just don’t want -- you guys are -- you’re giving me an anxiety panic attack is what you’re doing.” (Audio 11:06–15.) Mr. Crotto again informed the officers of his PSR worker and his home caretaker. (Audio 11:45–49.)

The officers continued to question Mr. Crotto about the presence of marijuana in his home. Officer Keely stated, “So here’s the deal, Marvin. Again, I’d really like to just work with you in this situation. Because nothing’s gonna change. K?” (Audio 12:19–29.) Officer Keely explained that because Mr. Crotto had the pipe and was acting nervous,

he believed there was “a little bit more here.” (Audio 12:21–47.) Mr. Crotto responded, “Oh god,” and walked back to his bedroom a second time with Officer Reimers. (Audio 12:43–50.)

While Mr. Crotto retrieved another item, Mr. Crotto’s friend and Officer Keely had the following exchange:

FRIEND: “Hey, he’s a head case a little bit.”

OFFICER KEELY: “He’s what?”

FRIEND: “He’s kinda got some mental issues.”

OFFICER KEELY: “Oh yeah.”

FRIEND: “He’s not gonna hurt anybody. But he’s just --

OFFICER KEELY: Okay.

FRIEND: Not one hundred percent there, you know?

OFFICER KEELY: Okay.

(Audio 12:50–13:03.) Mr. Crotto returned with “a couple nugs” of marijuana. (Audio 13:05–07; Tr. Vol. I, p.19, Ls. 2–21.)

The officers continued to question Mr. Crotto about “a little bit more.” (Audio 13:22–38.) Mr. Crotto said, “Oh, Jesus. No. I just barely got that.” (Audio 13:39–42.) Officer Keely stated, “Again nothing’s gonna change today. K. -- you’re being cooperative. So as long as you’re being cooperative, I want to work with you and do what we talked about.” (Audio 13:42–52.) Officer Keely asked, “Do you mind going and letting Officer Reimers check make sure there’s nothing else?” (Audio 13:58–14:02.) Mr. Crotto refused, stating, “No, he’s not gonna check. Nothing else. You guys are done what you’re gonna do.” (Audio 14:02–06.)

Officer Keely then informed Mr. Crotto that he wanted “to finish searching the trailer” for drug-related items. (Audio 14:30–15:00.) Officer Keely said, “I have to finish

out the complaint.” (Audio 14:57–58.) Mr. Crotto responded, “You guys are gonna take me to jail.” (Audio 15:00–01.) The officers told him multiple times that they were not taking him to jail and “nothing changes” no matter what items were found by the officers. (Audio 15:02–16:15.) Officer Keely explained, “But I do have to clear up the complaint. I have to finish completing or my sergeant’s gonna [sic] say I didn’t finish the job.” (Audio 15:27:33.)

After further questioning, Officer Reimers accompanied Mr. Crotto a third time to his bedroom. (Audio 16:16–30; Tr. Vol. I, p.20, L.23–p.21, L.15.) Mr. Crotto returned with about “a quarter” of marijuana. (Audio 16:58–17:01; Tr. Vol. I, p.21, L.11–13.) Officer Reimers reported that Mr. Crotto got the marijuana from a safe. (Audio 17:05–09.)

Officer Keely informed Mr. Crotto that he suspected that Mr. Crotto had more items, but “nothing changes” if he found more. (Audio 17:22–41.) Officer Keely asked, “So what -- additional [sic] in there have you not shown us that you’re worried about? How much more do you have?” (Audio 17:41–49.) Mr. Crotto responded, “I don’t have more.” (Audio 17:49–51.) Officer Keely then asked if Officer Reimers could look in the safe. (Audio 17:53–58.) Mr. Crotto responded, “No . . . You guys are gonna take me to jail.” (Audio 17:55–18:03.) The officers both promised that they would not take him to jail. (Audio 18:03–18:09.) Mr. Crotto asked, “Then, why won’t you leave me alone? I gave you all my pot.” (Audio 18:10–28.) Officer Keely inquired into the other items in Mr. Crotto’s safe, including whether he had “some pills or something in there.” (Audio 18:18–41.) Mr. Crotto answered, “I got [sic] lots of pills everywhere.” (Audio 18:41–43.)

Mr. Crotto then admitted to having two grinders in the safe. (Audio 18:44–19:05.) Officer Keely then asked, “Anything else?” (Audio 19:06–08.) In response, Mr. Crotto stated: “I can’t think right now. I just want to go to Intermountain.⁵ I want to go to Intermountain. . . . Intermountain. You guys got me just freaked out. I want to go to Intermountain. I want to go to Intermountain.” (Audio 19:06–32.) The officers told Mr. Crotto that he could “walk out the door right now” to Intermountain, and Mr. Crotto responded, “Yeah right.” (Audio 19:33–48.) Officer Keely said, “You can. Here’s the deal, Marvin. When you’re being cooperative then it at this point -- I’m holding my promise.” (Audio 19:50–55.) Mr. Crotto stated, “You said I’m not being cooperative still. Cuz I won’t let you guys [inaudible].” (Audio 19:55–58.)

Officer Keely asked again for Mr. Crotto to let Officer Reimers to search the bedroom and the safe. (Audio 20:04–11.) Mr. Crotto mumbled, “I want to go to Intermountain.” (Audio 20:14–16.) At this time, Mr. Crotto’s friend told him to “take a deep breath” and “relax.” (Audio 20:15–18.) Mr. Crotto stated, “I can’t,” and “I just want to go to Intermountain.” (Audio 20:18–27.) Officer Keely and Reimers then explained to Mr. Crotto that “we can be gone real fast if we finish the search” and informed him that they will “contact the prosecutor” and “apply for a search warrant” if he decides to leave. (Audio 20:23–22:00.) Officer Keely stated to him that “no one’s going to jail” if he consents to the search. (Audio 22:01–13.) He explained:

You’ve already told me there’s more stuff in the safe. So if you don’t want to let me continue to search, that’s completely your choice. You’re free to go in that fashion -- manner. But understand this. Now that you’ve told me there’s, um, stuff in the safe, if I go apply for a search warrant, the judge is gonna [sic] hear that information. And then they’re gonna [sic] make a

⁵ As found by the district court, “Intermountain” is “a mental health treatment facility.” (R., pp.66–67.)

determination as to whether a search warrant is warranted or not for the rest of the trailer.

(Audio 22:27–55.) During Officer Keely's statements and repeated requests to search, Mr. Crotto responded, "I don't understand all this," and "I don't understand it." (Audio 23:27–23:35.) He stated, "Please, please, let my PSR [inaudible]." (Audio 23:36–39.)

After further comments by Officer Keely, Mr. Crotto took Officers Reimers back to his bedroom for the fourth time. (Audio 24:07–11; Tr. Vol. I, p.22, L.20–p.23, L.13.) This time, Officer Reimers searched the safe in Mr. Crotto's bedroom. (R., p.67.) While Officer Keely waited for Officer Reimers to return, he told Mr. Crotto's friend, "We're not taking advantage of him. We will hold to our word . . . I just have to finish the complaint." (Audio 24:18–27.)

Officer Reimers and Mr. Crotto came back from the bedroom, and Mr. Crotto asked his friend to leave. (Audio 27:06–28:10.) Once Mr. Crotto's friend left, Officer Reimers explained that there was a baggie with "just a little bit of meth" in the safe. (R., p.67; Audio 28:11–33; Tr. Vol. I, p.22, Ls.23–25, p.59, Ls.12–23.) Officer Reimers also observed drug paraphernalia in the safe. (R., p.67; Audio 28:20–43; 43:57–44:24.) Mr. Crotto stated that the meth was "just something personal," but he admitted that he sold a small amount of marijuana to support his own use. (Audio 28:48–30:09, 32:55–01; Tr. Vol. I, p.50, L.22–p.51, L.1.)

Officer Reimers asked Mr. Crotto to search the rest of his bedroom, and Mr. Crotto allowed it. (Audio 33:06–33:24; Tr. Vol. I, p.47, Ls.8–15.) The officers did not find any more marijuana or methamphetamine. (Tr. Vol. I, p.24, Ls.10–22.)

During the suppression hearing, Officers Keely testified that he believed Mr. Crotto "understood very clearly" and did not "make me think he was not capable to

make those decision on his own.” (Tr. Vol. I, p.23, L.24–p.24, L.6.) Officer Keely also confirmed that he had some knowledge of a PSR worker’s job.⁶ (Tr. Vol. I, p.40, L.22–p.41, L.14.) Similarly, Officer Reimers testified that he believed Mr. Crotto understood what was being asked of him. (Tr. Vol. I, p.60, Ls.8–15.) Officer Reimers acknowledged, however, that Mr. Crotto told the officers on numerous occasions that he did not want the officers to search his trailer. (Tr. Vol. I, p. 65, Ls.2–8.)

On October 24, 2014, the district court issued an order denying Mr. Crotto’s motion. (R., pp.64–73.)

On November 20, 2014, Mr. Crotto pled guilty pursuant to a plea agreement. (R., pp.75–77; Tr. Vol. I, p.99, Ls.6–19.) Mr. Crotto agreed to plead guilty to possession of marijuana with the intent to deliver, and the State agreed to dismiss the remaining two charges. (R., pp.76–77.) Mr. Crotto reserved his right to appeal the denial of his motion to suppress. (R., p.77.) The district court accepted his guilty plea. (Tr. Vol. I, p.99, L.20–p.100, L.7.)

On February 3, 2015, the district court sentenced Mr. Crotto to five years imprisonment, with two years fixed, suspended the sentence, and placed him on probation for five years. (Tr. Vol. II, p.16, Ls.10–22.) The district court entered a Judgment of Conviction, Suspended Sentence, and Order of Probation on February 11, 2015. (R., pp.82–87.)

On February 17, 2015, Mr. Crotto filed a timely notice of appeal. (R., pp.94–95.) An amended notice of appeal was filed on April 2, 2015. (R., pp.101–04.)

⁶ PSR stands for “psychosocial rehab,” and a PSR worker is employed by the State to help take care of people with disabilities. (Tr. Vol. I, p.40, L.22–p.41, L.14.)

ISSUE

Did the district court err by denying Mr. Crotto's motion to suppress when Mr. Crotto's consent to search the safe was involuntary based on the totality of the circumstances?

ARGUMENT

The District Court Erred By Denying Mr. Crotto's Motion To Suppress Because Mr. Crotto's Consent To Search The Safe Was Involuntary Based On The Totality Of The Circumstances

A. Introduction

Mr. Crotto submits that the district court erred by denying his motion to suppress the evidence seized as the result of the search of his safe. Mr. Crotto not only tried to withdraw his consent numerous times, but also possessed such mental disabilities to make him incapable of providing voluntary consent under the circumstances. Moreover, Officers Keely and Reimers had knowledge of Mr. Crotto's incapacity, yet the officers proceeded to subtly coerce Mr. Crotto until he unwillingly gave in to the officers' demands. For these reasons, Mr. Crotto respectfully requests that this Court reverse the denial of his motion to suppress or, alternatively, vacate and remand for further proceedings.

B. Standard Of Review

The Court uses a bifurcated standard to review a district court's order on a motion to suppress. *State v. Wulff*, 157 Idaho 416, 418 (2014); *State v. Ellis*, 155 Idaho 584, 587 (Ct. App. 2013). The Court will accept the trial court's findings of fact "unless they are clearly erroneous." *Wulff*, 157 Idaho at 418. Findings of fact are clearly erroneous if they are not supported by substantial and competent evidence. *State v. Danney*, 153 Idaho 405, 408 (2012); *see also Ellis*, 155 Idaho at 587. "At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court." *Ellis*, 155 Idaho at

587. The Court exercises free review over the “application of constitutional principles in light of those facts.” *Wulff*, 157 Idaho at 418.

C. The District Court Lacked Substantial And Competent Evidence To Find That Mr. Crotto Gave Voluntary Consent In Light Of His Mental Disability And Attempts At Revocation

“The Fourth Amendment of the United States Constitution protects citizens from unreasonable search and seizure. A search and seizure, conducted without a warrant issued on probable cause, is presumptively unreasonable.” *State v. Hansen*, 138 Idaho 791, 796 (2003) (citations omitted). Voluntary consent to a search is an exception to the warrant requirement, however. *State v. Smith*, 144 Idaho 482, 488 (2007); *State v. Jaborra*, 143 Idaho 94, 97 (Ct. App. 2006).

“It is the State’s burden to prove, by a preponderance of the evidence, that the consent was voluntary rather than the result of duress or coercion, direct or implied.” *Jaborra*, 143 Idaho at 97. This has also been described as “a heavy burden to prove that the consent was given freely and voluntarily.” *State v. Huskey*, 106 Idaho 91, 94 (Ct. App. 1984) (citing *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968)).

“A voluntary decision is one that is ‘the product of an essentially free and unconstrained choice by its maker.’ An individual’s consent is involuntary, on the other hand, ‘if his will has been overborne and his capacity for self-determination critically impaired.’” *Jaborra*, 143 Idaho at 97 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)). To determine whether an individual’s will was overborne in a particular case, “the court must assess ‘the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.’” *Id.* (quoting *Bustamonte*, 412 U.S. at 226). “In examining all the surrounding circumstances to

determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.” *Bustamonte*, 412 U.S. at 229; *accord, e.g., State v. Varie*, 135 Idaho 848, 852 (2001); *State v. Linenberger*, 151 Idaho 680, 686 (Ct. App. 2011). Factors pertaining to the subjective state of the person who consents include “lack of education,” “low intelligence,” and “the repeated and prolonged nature of the questioning.” *Bustamonte*, 412 U.S. at 226. Additional factors to determine voluntariness include: (a) the number of officers involved in the confrontation; (b) the location and conditions of the consent, such as the time of day; (c) if the police retained the individual’s identification; (d) whether the individual was free to leave; and (e) whether the individual knew of his right to refuse consent. *Jaborra*, 143 Idaho at 97.

Even if an individual voluntarily consents to a search, that consent may be revoked. *State v. Thorpe*, 141 Idaho 151, 154 (2004); *State v. Staatz*, 132 Idaho 693, 696 (1999). After an individual has revoked consent, a subsequent search by law enforcement is no longer pursuant to the initially voluntary consent. *Thorpe*, 141 Idaho at 154; *see also Staatz*, 132 Idaho at 696. The standard for measuring a revocation of consent “is that of objective reasonableness, ‘what would the typical reasonable person have understood by the exchange between the officer and the subject.’” *Thorpe*, 141 Idaho at 154 (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)); *see also Staatz*, 132 Idaho at 696.

In this case, Mr. Crotto argues that the district court’s finding that he gave voluntary consent to search the safe was clearly erroneous. *See Wulff*, 157 Idaho at 418. Mr. Crotto contends that the evidence in the record shows his consent was the

result of coercion and duress. He submits that Officers Keely and Reimers had knowledge of his mental disability, but the officers continued to pressure him to consent despite his vulnerable state and attempts at revocation. In sum, Mr. Crotto contends that the totality of the circumstances demonstrate by substantial and competent evidence that his consent to search the safe was involuntary.

1. Mr. Crotto's Mental Disability

The district court found that Mr. Crotto's mental health condition did not influence his ability to consent. Specifically, the district court stated:

Viewing the encounter as a whole, there is simply no indication that the defendant's mental health condition(s) rendered him unable to validly consent to a search of the safe Rather, the evidence supports the officers' testimony that the defendant possessed adequate mental faculties, at the time of the encounter, to validly consent to the search of the safe.

(R., p.73.) The district court also found that Mr. Crotto's reference to his PSR worker was intended to explain the frequent traffic in and out of his home. (R., pp.72–73.) The district court further found that Mr. Crotto's PSR worker reference was a demonstration of his "considerable sophistication" and understanding of the situation. (R., pp.72–73.) Based on the evidence in the record, Mr. Crotto contends that these findings are unsupported by the evidence and clearly erroneous.

For one, contrary to the district court's findings, Mr. Crotto did not reference his PSR worker just one time to explain away the frequent traffic in and out of his home. Rather, Mr. Crotto repeatedly referenced his PSR worker to express his lack of sophistication, his inability to understand the situation, and his distress brought on by the officers' persistent questioning.

During his initial exchange with the officers, Mr. Crotto referenced his PSR worker not one but five times. First, as found by the district court, Mr. Crotto explained the traffic in and out of his house by stating: “Well, I have, you know, caretakers that come every single day. I got [sic] a PSR worker that comes twice a week. And a therapist [inaudible].” (Audio 3:31–40.) Shortly thereafter, he referenced his PSR worker a second time, stating: “I got [sic] so much going on with my caretakers, and PSR workers, and therapists, and all that kinda stuff.” (Audio 3:47–55.) Third, he explained that, other than a few friends, the traffic was “all state workers and stuff. PSR worker. Health care. And all that stuff.” (Audio 4:03–16.) Similarly, he stated a fourth time that his visitors were “just PSR workers. And I got [sic] a lot of stuff going on.” (Audio 5:35–39.) Fifth, he explained, “‘Cuz they’re here -- My caretaker’s here every day. And my PSR workers twice a week. And therapist once a week.” (Audio 5:42–52.)

After Mr. Crotto’s initial explanation of the traffic in and out of his home, Mr. Crotto referenced his PSR worker three more times. First, before the first trip to Mr. Crotto’s bedroom, Mr. Crotto implored the officers to: “Get a hold of my PSR worker, my caretaker worker or something then.” (Audio 8:23–26.) He also offered his PSR worker’s phone number—to which Officer Keely retorted, “I don’t care about your PSR worker.” (Audio 8:28–35.) Then, prior to the second trip to his bedroom, he again informed the officers of his PSR worker and home caretaker. (Audio 11:45–49.) Finally, prior to the fourth trip to his bedroom, Mr. Crotto stated, “Please, please, let my PSR [inaudible].” (Audio 23:36–39.) Based on this evidence, the district court’s finding that Mr. Crotto referenced his PSR one time to explain away the anonymous tip is clearly erroneous.

In addition to the repeated references to his PSR worker, Mr. Crotto and his friend made other statements that established Mr. Crotto's mental disability. When Officer Keely asked Mr. Crotto what kind of disability he had, Mr. Crotto answered, "Uh, kind of mental." (Audio 4:19–22.) On his own initiative, Mr. Crotto's friend told Officer Keely that Mr. Crotto was "a head case," had "some mental issues," and was "[n]ot one hundred percent there." (Audio 12:50–13:30.) Mr. Crotto later asked many times to go to "Intermountain" in part because "I can't think right now." (Audio 19:06–32, 20:18–27.) Finally, Mr. Crotto told the officers twice that he did not understand their explanation of the search warrant process. (Audio 23:27–23:35.) This evidence shows that Officers Keely and Reimers learned of Mr. Crotto's mental disability through multiple statements reflecting his confusion and distress, as well as his numerous references to his PSR worker, caretaker, and therapist.

In light of this evidence in the record, the district court's finding that Mr. Crotto "possessed adequate mental facilities" to consent is clearly erroneous. Substantial and competent evidence shows that Mr. Crotto lacked the capacity to consent due to his mental disability and duress. Moreover, the district court failed to consider Mr. Crotto's vulnerable subjective state as a result of its erroneous factual finding on his mental facilities. The totality of the circumstances analysis must take into account "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Bustamonte*, 412 U.S. at 229. Due to the district court's failure to adequately consider Mr. Crotto's subjective state, Mr. Crotto submits that the district court's finding of voluntary consent was in error.

2. Mr. Crotto's Attempts At Revocation

In addition to Mr. Crotto's vulnerable subjective state, Mr. Crotto's attempts to revoke consent show that his eventual consent to search the safe was involuntary. The district court found that Mr. Crotto knew that he could refuse consent to search based on the fact that Mr. Crotto "repeatedly refused to consent to direct requests by Officer Keely to search, and the officers honored his refusal." (R., p.71.) Mr. Crotto submits that these findings are clearly erroneous.

Mr. Crotto contends that substantial and competent evidence shows that he did not know he could refuse consent. Officer Keely and Reimers eliminated any belief that Mr. Crotto could refuse consent by their disregard of his attempts at revocation. Mr. Crotto submits the evidence establishes that Officer Keely and Reimers ignored his attempts at revocation to such an extent that it was apparent the officers would not take "no" for an answer to their request to search the safe. Rather than honoring Mr. Crotto's revocations, Officers Keely and Reimers continued to question him until he acquiesced to the search—despite their knowledge of his mental vulnerabilities. Mr. Crotto contends that his attempts to revoke consent, coupled with his mental disability and duress, further demonstrate that his consent was involuntary.

The first attempt at revocation occurred before Mr. Crotto's first trip with Officer Reimers into his bedroom. Officer Keely asked if Mr. Crotto would walk around his home with Officer Reimers, and Mr. Crotto responded, "I'd prefer not." (Audio 6:17–19.) Upon further questioning, Mr. Crotto clarified, "Just it's private. It's my house," and "I don't really want you [inaudible] through the house." (Audio 6:21–23, 6:30–33.) After even more requests to search, Mr. Crotto responded, "I'd prefer not." (Audio 6:41–43.)

Officer Keely continued to ask Mr. Crotto to allow a search. Mr. Crotto eventually acquiesced, but shortly thereafter he tried again to revoke his consent. He stated, "I just don't want you -- into my house. It's quite simple. You guys are making me nervous." (Audio 8:15–21.) After further questioning, Mr. Crotto stated, "I just don't want you in my room. It's my room. I got [sic] all my stuff laying out. Personal stuff." (Audio 8:48–54.) Realizing that the officers were not going to honor his revocation, Mr. Crotto gave in to the search of his bedroom. (Tr. Vol. I, p.18, Ls.4–6, p.57, Ls.11–13.)

The second attempt at revocation occurred before Mr. Crotto's third trip to his bedroom. Officer Keely asked Mr. Crotto, "Do you mind going and letting Officer Reimers check make sure there's nothing else?" (Audio 13:58–14:02.) Mr. Crotto flatly refused. He stated, "No, he's not gonna check. Nothing else. You guys are done what you're gonna do." (Audio 14:02–06.) Officer Keely continued to ask to search: "K, let me explain to you why -- why I have to." (Audio 14:06–10.) A short time thereafter, Officer Keely again asked to search Mr. Crotto's bedroom, and Mr. Crotto eventually complied. (Audio 14:34–15:02.)

The third and final attempt at revocation occurred before Mr. Crotto's fourth trip to the bedroom. Officer Keely asked, "So do you mind Officer Reimers going back with you and opening up the safe so he can take a look at that?" (Audio 17:53–58.) Mr. Crotto said, "No." (Audio 17:55.) He then stated, "You guys are gonna take me to jail." (Audio 18:01–03.) Both officers promised that Mr. Crotto would not go to jail today. (Audio 18:03–18:09.) Mr. Crotto then exclaimed, "Then, why won't you leave me alone? I gave you all my pot. Jesus Christ!" (Audio 18:10–28.) Eventually, after further questioning, Mr. Crotto acquiesced to a search of the safe. (Audio 18:28–24:11.)

Mr. Crotto submits that these exchanges with Officers Keely and Reimers were his best efforts at revocation when taking into consideration his mental disability and duress. Based on the totality of the circumstances, a typical reasonable person would have understood that Mr. Crotto wanted the officers to end the search and leave his home by these exchanges. See *Thorpe*, 141 Idaho at 154; *Staatz*, 132 Idaho at 696. The district court erred by failing to consider Mr. Crotto's continual refusals to consent in conjunction with his mental disability and duress. With consideration of these factors together, substantial and competent evidence does not support the district court's finding of voluntary consent.

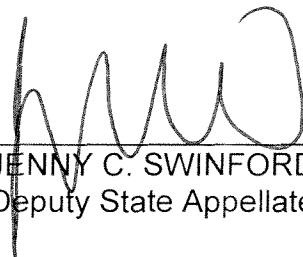
The facts of this case highlight the importance of law enforcement to obtain voluntary consent and respect revocation. "Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." *State v. Halseth*, 157 Idaho 643, 646 (2014). The failure of law enforcement to honor an individual's revocation essentially erodes the concept of voluntary consent. The Court of Appeals acknowledged this concept in *Staatz*: "Ignoring a party's revocation of consent to be in a residence . . . is untenable. To hold otherwise would drastically curtail the ability of an individual to revoke his or her consent." 132 Idaho at 697. Therefore, "[w]hen a police officer is in a private residence solely pursuant to a resident's consent, the officer must respect a revocation of that consent." *Id.*; accord *Thorpe*, 141 Idaho at 154. The revocation of consent must be respected because "[o]ne cannot expect a resident to continue to object after his or her first request to leave has been rebuffed by the authorities." *Staatz*, 132 Idaho at 697.

These same concerns are present here. Mr. Crotto informed Officers Keely and Reimers of his PSR worker eight times. He also told them that he had a mental disability. His friend told them that he was “head case” with “some mental issues.” Then, Mr. Crotto attempted to revoke his consent at least three separate times to no avail. One could not expect Mr. Crotto to continue to object after his requests were rebuffed by the officers. *See id.* With his revocations ignored, Mr. Crotto asked repeatedly to go to Intermountain. He also stated that he did not understand and needed help. Thus, after about twenty-four minutes of Mr. Crotto informing the officers of his mental disability, trying to withdraw consent, asking for assistance, and, finally, insisting on going to a mental health facility, Mr. Crotto acquiesced to the search of the safe. This was not voluntary consent. To the contrary, Mr. Crotto’s will had “been overborne and his capacity for self-determination critically impaired” by the actions of Officers Keely and Reimers. *Jaborra*, 143 Idaho at 97.

CONCLUSION

Mr. Crotto respectfully requests that this Court reverse the district court’s denial of his motion to suppress. In the alternative, he respectfully requests that this Court vacate the district court’s order and remand for further factual findings.

DATED this 14th day of September, 2015.



JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of September, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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STEVEN J HIPPLER
DISTRICT COURT JUDGE
E-MAILED BRIEF

ANTHONY GEDDES
ADA COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

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Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read 'Evan A. Smith', written over a horizontal line.

EVAN A. SMITH
Administrative Assistant

JCS/eas